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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-first session, 17–21 November 2014

No. 45/2014 (Togo)*

Communication addressed to the Government on 4 August 2014

Concerning Kpatcha Gnassingbé, Ougbakiti Seïdou, Esso Gnassingbé, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema and Efoé Sassouvi Sassou

The Government replied to the communication on 8 October 2014.

The State is a party to the International Covenant on Civil and Political Rights, to which it acceded on 24 May 1984.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years by Council resolution 24/7 of 26 September 2013. Acting in accordance with its methods of work (A/HRC/16/47, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

* In accordance with paragraph 5 of the methods of work of the Working Group (A/HRC/16/47, annex), the member of the Working Group who is a national of the State did not participate in the consideration of the case or the discussion thereof.

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(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. This case was submitted to the Working Group on Arbitrary Detention in the following terms.

4. Seven persons of Togolese nationality were allegedly arrested between April and October 2009 by the Togolese authorities and detained in various prisons around the country. The persons reportedly concerned are: Kpatcha Gnassingbé, a member of the Togolese National Assembly, born on 6 September 1970, who has been held in Lomé civil prison since 17 April 2009; Ougbakiti Seïdou, a chief warrant officer (retired) in the Togolese armed forces, born in 1947, who has been held in Lomé civil prison since 28 April 2009; Essozimma (known as Esso) Gnassingbé, a telecommunications technician, born on 30 September 1979, who has been held in Tsévié civil prison since 5 May 2009; Abi Atti, a major in the Togolese armed forces, born on 7 February 1963, who has been held in Atakpamé civil prison since 14 October 2009; Soudou Tchinguilou, an accounting manager, born on 18 April 1971, who has been held in Atakpamé civil prison since 28 April 2009; Kokou Tchaa Dontema, a captain in the gendarmerie, born on 4 March 1970, who has been held in Sokodé civil prison since 14 October 2009; and Efoé Sassouvi Sassou, a second lieutenant (discharged) in the gendarmerie, employed at the United States Embassy in Lomé, born on 19 July 1969, who has been held in Sokodé civil prison since 28 April 2009.

5. According to the information received, on 12 April 2009, at around 10 p.m., a group of soldiers belonging to the Rapid Intervention Force, an elite unit of the Togolese armed forces, burst into the home of Kpatcha Gnassingbé and opened fire with automatic weapons and rocket launchers. The source reports that Kpatcha Gnassingbé was able to contact his brother, Colonel Rock Gnassingbé, the commander of a Togolese army tank unit, and seek his intervention.

6. On 15 April 2009, Kpatcha Gnassingbé went to the Embassy of the United States of America in Lomé to seek protection; at 7.30 a.m., the Commander of the Togolese National Gendarmerie arrived at the Embassy with an arrest warrant, obliging the United States authorities to hand Kpatcha Gnassingbé over to him. The source states that Mr. Gnassingbé was accused of conspiring to undermine Togolese State security. He was placed in detention pursuant to a warrant of commitment dated 17 April 2009.

7. Subsequently, some 30 people, including the 6 other persons mentioned in the present communication, were arrested between April and October 2009 on the same grounds and placed in pretrial detention pursuant to a warrant of commitment. It is believed that 10 persons were ultimately released on 14 April 2011, but that Kpatcha Gnassingbé and the 6 persons mentioned in paragraph 4 above remain in custody.

8. These seven persons were reportedly held incommunicado for more than 2 years at the National Intelligence Agency, the Gnassingbé Eyadema military camp of the Togo Joint Regiment in Lomé and the National Gendarmerie camp in Lomé, where they were allegedly subjected to acts of torture. The source further states that they were denied access to legal counsel for more than 18 months.

9. These persons were committed for trial to the Judicial Chamber of the Supreme Court. In a judgement delivered on 15 September 2011, the Court sentenced them to terms of imprisonment for conspiracy to commit a crime against State security. Ougbakiti Seïdou, Esso Gnassingbé, Soudou Tchinguilou and Efoé Sassouvi Sassou were each sentenced to 10 years' imprisonment; Kokou Tchaa Dontema was sentenced to 15 years' imprisonment; and Kpatcha Gnassingbé and Abi Atti were each sentenced to 20 years' imprisonment.

10. The source asserts that Kokou Tchaa Dontema and Esso Gnassingbé were deprived of their right to defence during the trial, inasmuch as the judges of the Judicial Chamber of the Supreme Court refused to allow them to speak in their own defence and their lawyers withdrew from the proceedings in protest. The judges then allegedly refused to allow the lawyers in question to continue defending their clients.

11. During the trial, the detainees recounted how they had been subjected to acts of violence and torture. In its judgement, the Judicial Chamber therefore also requested the Government of Togo to undertake, as a matter of priority, an impartial inquiry into the allegations of torture.

12. The National Human Rights Commission was subsequently given the task of carrying out the inquiry and reportedly concluded in its report of 13 February 2012 that inhuman and degrading acts of physical and mental violence had been committed against these persons. On the basis of this report, the seven convicted persons petitioned the Supreme Court to review its judgement No. 59/11 of 15 September 2011 and suspend its execution; however, the Court, in a ruling on 19 July 2012, declared the petition inadmissible.

13. Subsequently, on 22 July 2011 (application received on 8 August 2011), these persons applied to the Court of Justice of the Economic Community of West African States (ECOWAS) for a finding that their rights had been violated, specifically through the unlawful arrest of Kpatcha Gnassingbé — at the time a member of the National Assembly and thus covered by parliamentary immunity, which has not been revoked — and the acts of torture and other cruel, inhuman or degrading treatment committed against all of these persons. The applicants sought the cessation of their incommunicado detention and their immediate release on the grounds that their rights to a fair trial, to defence, to be tried within a reasonable time by an independent and impartial court and to protection from physical and mental injury had been violated.

14. According to the information received, the Government informed the ECOWAS Court of Justice of the reasons justifying the detention. Prompted by reports about the planning of a crime against State security, the authorities first arrested Kpatcha Gnassingbé during the night of 12 April 2009 and then between April and October 2009 arrested certain of his associates, including the six other persons concerned in this case, at the request of the public prosecutor of the Lomé court of first instance. A search of the residence of Kpatcha Gnassingbé reportedly led to the seizure of military weapons. An investigation carried out by an examining magistrate appointed by the Director of Public Prosecutions in order to

comply with immunity rules reportedly revealed that Kpatcha Gnassingbé was planning to depose his brother, Faure Gnassingbé, the President of the Republic.

15. The source states that, in its judgement No. ECW/CCJ/JUD/06/13 of 3 July 2013, the ECOWAS Court of Justice found that the "Togolese State had, through its agents, committed acts of torture against the applicants and thus breached their right to protection from physical and mental injury", a finding which the Government did not deny. Although the Court found that parliamentary immunity had not been breached and that the right to be tried within a reasonable time and the right to visits had not been violated, it did find a violation of the right to a fair trial, arising from the use of evidence obtained through torture, and a violation of the right to defence, arising from the applicants' lack of access to legal counsel. The Court ordered that steps should be taken as a matter of urgency to put an end to the violation of the right to a fair trial. However, notwithstanding the Court's judgement — with which the Government has failed to comply — these persons reportedly remain in detention.

16. The source reports that article 53 of the Constitution of Togo of 14 October 1992 and article 77, subparagraphs 1 and 2, and article 79, subparagraphs 1 and 2, of the rules of procedure of the National Assembly prohibit the prosecution, arrest or trial of Assembly members as long as their parliamentary immunity has not been revoked. Even in a case of flagrante delicto, the Bureau of the National Assembly must be informed and give its express consent. In the present case, the source reports that the Togolese authorities arrested, detained and tried Kpatcha Gnassingbé, a member of the National Assembly, in violation of these legal provisions. Accordingly, the source considers that the detention of Kpatcha Gnassingbé is arbitrary, in violation of article 9 of the International Covenant on Civil and Political Rights.

17. Furthermore, the source emphasizes that there is a lack of evidence connecting these seven persons to an alleged crime against State security; it points out that the only evidence presented is the statements obtained through torture while these persons were detained at the premises of the National Intelligence Agency and that these acts of torture were confirmed by the National Human Rights Commission in its report of 15 February 2012 and by the ECOWAS Court of Justice in its judgement No. ECW/CCJ/JUD/06/13 of 3 July 2013. Consequently, according to the source, the detention of these persons is the result of a breach of the right to a fair trial (as provided for in article 14 of the International Covenant on Civil and Political Rights) arising from the use during the trial of evidence obtained through torture and from the violation of their right to defence (as provided for in article 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights) and their right to be tried promptly. The source asserts that the detention and conviction of these persons were the outcome of an unfair trial.

Response from the Government

18. The Working Group transmitted the above allegations to the Government of Togo in a letter dated 4 August 2014, requesting that it provide detailed information about the current situation of Kpatcha Gnassingbé, Ougbakiti Seïdou, Esso Gnassingbé, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema and Efoé Sassouvi Sassou and clarification of the legal provisions justifying their detention. On 8 October 2014, the Government responded to the allegations transmitted to it.

19. In its response, the Government maintains that the seven persons concerned in this case of deprivation of liberty were found guilty of conspiring to undermine internal State security, an offence under articles 229, 230 and 232 of the Criminal Code. The Judicial Chamber of the Supreme Court of Togo, in its judgement No. 59/11 of 15 September 2011, sentenced them to prison terms ranging from 10 to 20 years.

20. The Government adds that the National Human Rights Commission concluded, in its report of 15 February 2012, that inhuman and degrading acts of physical and mental violence had been committed against the detainees and recommended, among other things, that the victims should receive fair compensation. In its Judgement of 3 July 2013, the ECOWAS Court of Justice ordered the Togolese State to pay 20 million CFA francs to each of the complainants who had been subjected to acts of torture and 3 million CFA francs to the other complainants who had not been subjected to acts of torture. The Government states that this compensation has been paid in full by the Togolese State.

21. With regard to the release of the detainees, the Government affirms that the ECOWAS Court of Justice has stated that there is no reason to order their release inasmuch as their detention has a legal basis and is not arbitrary. The Government states that the legal basis for the detention of these persons is articles 229, 230 and 232 of the Criminal Code of Togo and judgement No. 59/11 of 15 September 2011 of the Judicial Chamber of the Supreme Court.

Comments from the source

22. The Government's response was transmitted to the source for comment. In a letter dated 11 November 2014, the source maintains that, even though the Government has awarded compensation to each complainant as ordered by the ECOWAS Court of Justice, it has failed to ensure redress within the meaning of article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The source notes that the Court of Justice ordered the Togolese State to take the necessary steps, as a matter of urgency, to put an end to the violation of the right to a fair trial, which it has thus far failed to do.

Discussion

23. According to the information submitted to the Working Group, Kpatcha Gnassingbé was placed in detention pursuant to a warrant of commitment dated 17 April 2009. Ougbakiti Seïdou, Esso Gnassingbé, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema and Efoé Sassouvi Sassou were arrested between April and October 2009 on the same grounds and placed in pretrial detention pursuant to a warrant of commitment. Kpatcha Gnassingbé and the six other persons reportedly remain in custody.

24. The Judicial Chamber of the Supreme Court delivered a judgement on 15 September 2011 sentencing these persons to prison terms for conspiracy to commit a crime against State security. Ougbakiti Seïdou, Esso Gnassingbé, Soudou Tchinguilou and Efoé Sassouvi Sassou were each sentenced to 10 years' imprisonment; Kokou Tchaa Dontema was sentenced to 15 years' imprisonment; and Kpatcha Gnassingbé and Abi Atti were each sentenced to 20 years' imprisonment.

25. The allegations submitted by the source relate to incommunicado detention; acts of torture used to obtain confessions during the preliminary investigation, without any administrative or judicial inquiry having been conducted to determine the lawfulness of those confessions; and deprivation of the right to fundamental legal safeguards, such as access to a lawyer and the right to be tried within a reasonable time by an independent and impartial court. It is alleged that Kokou Tchaa Dontema and Esso Gnassingbé were also deprived of their right to defence.

26. In its response, the Government does not provide specific answers to the allegations, including those allegations relating to the acts of torture that were committed during the incommunicado detention of these persons. This silence is all the more troubling inasmuch as the allegations were confirmed by the ECOWAS Court of Justice and the National Human Rights Commission. Furthermore, it is inexplicable that no administrative or

judicial investigation has been ordered, particularly since the alleged confessions, which were obtained through torture, were decisive evidence in the conviction of these seven persons.

27. In that regard, it should be noted that the Government had an obligation, under article 12 of the Convention against Torture, to which Togo is a party, to "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed", especially since, under article 15 of the Convention, any statement obtained as a result of torture must not be invoked as evidence.

28. The Government is accused of holding these persons in incommunicado detention for approximately 18 months without bringing them before a judge during that period and without allowing them access to counsel.

29. The Working Group is of the view that secret detention is irreconcilably in violation of international human rights law, including during states of emergency and armed conflict. No jurisdiction should allow for individuals to be deprived of their liberty in secret for potentially indefinite periods, held outside the reach of the law, without the possibility of resorting to legal procedures, including habeas corpus (A/HRC/16/47, para. 54).

30. In its settled jurisprudence, the Working Group has confirmed that the prohibition of arbitrary detention forms part of customary international law and falls within the category of jus cogens norms (peremptory norms) and therefore gives rise to an obligation to undertake an investigation and, where appropriate, to the right to obtain compensation

31. According to the Committee against Torture, it is when suspects cannot communicate with their families and lawyers that they are most likely to be tortured (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2 and 11).

32. The violations cited have been condemned by the Working Group in its settled jurisprudence, as summarized above, especially inasmuch as they violate the right to defence and due process guarantees. On the basis of these observations, the Working Group finds that the detention and the conviction of the persons concerned on the basis of confessions obtained under torture — in the absence of any material or other evidence and without any investigation having taken place to confirm the veracity of the confessions — are in breach of articles 9, 10 and 11 of the Universal Declaration of Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights, and fall under category III of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

33. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Kpatcha Gnassingbé, Ougbakiti Seïdou, Esso Gnassingbé, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema and Efoé Sassouvi Sassou is arbitrary and constitutes a violation of the rights and freedoms guaranteed by articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. Accordingly, it falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

34. Consequent upon the opinion rendered, the Working Group requests the Government of Togo to order the immediate release of Kpatcha Gnassingbé, Ougbakiti Seïdou, Esso Gnassingbé, Abi Atti, Soudou Tchinguilou, Kokou Tchaa Dontema and Efoé Sassouvi Sassou, and to order an independent and impartial investigation of the acts of

torture to which these persons were allegedly subjected during their incommunicado detention, and to address any legal implications thereof in accordance with its international obligations by reviewing their trial or by providing full reparation for the injury caused, in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

35. The Working Group recalls that the Human Rights Council has requested all States to cooperate with the Working Group, to take account of its views and to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[1] Accordingly, the Working Group requests the full cooperation of the Republic of Togo in implementing this opinion in order to provide an effective remedy for a violation of international law.

[*Adopted on 19 November 2014*]

[1] Human Rights Council resolution 24/7, paras. 3, 6 and 9.